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ALAN RAYWID
(1930-1991)

CABLE ADDRESS
"CRAB"

TELECOPIER
(202) 452-0067

August 3, 1993

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Cable Television Rate Regulation
MM Docket No. 92-266

Dear Mr. Caton:

On behalf of Daniels Cablevision, Inc. ("Daniels"), enclosed is a letter dated August 3, 1993 to the Office of Management & Budget. We request that this letter be associated with the "Supplement to Pending Motion for Stay" filed by Daniels on July 30, 1993 in the referenced proceeding.

Respectfully submitted,

John P. Cole, Jr.

Enclosure

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August 3, 1993

VIA HAND DELIVERY

Mr. Jonas Neihardt
OFFICE OF MANAGEMENT & BUDGET
New Executive Office Building
725 17th Street, N.W.
Room 3235
Washington, D.C. 20503

Re: TITLE: Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment

FCC FORM 393

Dear Mr. Neihardt:

This letter is submitted on behalf of Daniels Cablevision, Inc. ("Daniels") and supplements Daniels' letter filed with the Office of Management & Budget on Friday, July 30,

approval of FCC Form 393 for the reasons set forth in the attached letter.

Respectfully,

John P. Cole, Jr.

Enclosure

cc: William F. Caton, Acting Secretary (Via Hand Delivery)
Federal Communications Commission
1919 M Street, N.W., Rm. 222
Washington, D.C. 20554

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July 30, 1993

VIA HAND DELIVERY

Mr. Jonas Neihardt
OFFICE OF MANAGEMENT & BUDGET
New Executive Office Building
Room 3235
Washington, D.C. 20503

Re: TITLE: Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment

FCC FORM 393

Dear Mr. Neihardt:

This is on behalf of Daniels Cablevision, Inc. and responds to the notice published in 58 Fed. Reg. 38377 (Daily Ed. July 16, 1993). Daniels Cablevision is a cable television operator subject to the requirement to complete proposed FCC Form 393. For the reasons that follow, the Form and the substantial burdens that it places on all cable television operators are facially unconstitutional and otherwise unlawful. We respectfully ask that OMB, in its review, not sweep this fact under the table.

Initially, we observe that the notice erroneously and misleadingly represents that the "reporting burden for this information is estimated to average 40 hours per response." A more accurate estimate would be 100 hours, provided that the respondent in question is fully versed in the 500 page-plus Report and Order of the Federal Communications Commission (FCC), released May 3, 1993 (summary published in 58 Fed. Reg. 29736 (Daily Ed. May 21, 1993)), which promulgates and explains the basis for the proposed reporting form. Moreover, all cable

operators are required to materially revise their accounting practices to conform to the new policies and reporting requirements, thereby imposing further and substantial new costs on their businesses. This assumption of 100 hours, in the typical case, further comprehends the expenditure of thousands of dollars for professional consultants and counsel in an effort to comprehend the subject regulations and particularly their impact on the operator's business. In this regard, it is critical that cable operators fully understand all rights that they may (or may not) have under the FCC's rate-regulation regime, at best a very complex, expensive, ever changing and highly uncertain process.

Even more fundamentally, the FCC form, on its face, targets, and is directed exclusively to, communicative activity, including the selection, arrangement, pricing and distribution of fully protected speech to public subscribers. There can be no doubt that cable operators and programmers are a vital component of the press and engage in activities protected by the First Amendment. Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). The sole function and purpose of FCC Form 393, and indeed its only reason for being, is for the Government to exercise the most comprehensive dominion over the cable television media through regulating its subsistence. By purpose and effect, FCC Form 393 therefore confronts the command of the First Amendment: "Congress shall make no law --- abridging the freedom of speech or of the press." This unambiguous constraint on the power of Government assures a press independent of the will, or even the subtle influence, of public officials. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-60 (1988). The freedom of speech and press is guaranteed by the Bill of Rights through institutionally foreclosing Government's select or ad hoc intrusion into those specially guarded preserves. It is well settled that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 491 (H. Lodge ed. 1888)(A. Hamilton) (emphasis in original). See also 11 Charles Montesquieu, De L'Espirit Des Louis 4 (Thom. Nuggent trans., 1899)(1748) ("men entrusted with power tend to abuse it"). Thus, rate regulation of the communications media is, by definition as well as reality, a content-based intrusion into the distribution of speech.

The activity conducted by cable operators and targeted by Form 393 -- the selection and distribution of speech -- is not alleged to be unlawful or to conflict with any other lawful right or constitutionally protected interest. Nor has the FCC advanced the proposition that promulgation of the subject form is essential or compelling in the national interest. Indeed, not only has the FCC failed to advance, or even suggest, a

compelling-interest argument in support of its regulatory scheme, the agency, in 500 pages of Report and Order, stands mute regarding any First Amendment implications. Where a regulation specially and selectively burdens expressive activity, thereby unquestionably implicating the First Amendment, the silence of the FCC is fatal to promulgation of the Form and its underlying policies. One may only assume that the FCC is not conscious of its transgression of the constitutional command. Or, is OMB, contrary to reality, common sense and legions of precedent, simply to assume that the subject Form and all that it comprehends constitute appropriate governmental action under the Constitution?

Moreover, the form and its underlying FCC Report and Order are not understandable. As the Federal Register notice points out, the suggested form is in a process of continuous revision in an effort to bring clarity to the present chaos. The effort, however intense or genuine, cannot succeed.

The fundamental, and constitutionally disqualifying, defect in FCC Form 393 is that it facially conflicts with the First Amendment to the U.S. Constitution. See Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 793-94 (1988). The identical deficiencies unlawfully imposed by the State of North Carolina in Riley (and far more) are present in the "benchmark" scheme advanced by the FCC. As in Riley, "the burden is placed on the [cable operator] to rebut the presumption advanced by the ordained benchmark rate. Id. at 793. As in Riley, the First Amendment simply does not countenance "a measure that requires the speaker to prove 'reasonableness' case by case based upon what is at best a lose inference that the [cable subscription] fee might be too high." Id. As in Riley, the FCC scheme comprehends a "factfinder [either local or federal officials], who may still decide that the cost incurred or the [cable operator's] profit were excessive." Id. As in Riley, cable operators too are "faced with the knowledge that [their charges] in excess of [the benchmark rate] will subject them to potential litigation over the 'reasonableness' of the fee." Id. at 794. As in Riley, it is the cable operator that "must bear the cost of litigation and the risk of a mistaken adverse finding by the factfinder, even if the [operator] believe[s] that the fee was in fact fair." Id. And, as found in Riley, "[T]his scheme must necessarily chill speech in direct contravention of the First Amendment's dictates." Id. "Whether one views this as a restriction of the [cable operator's] ability to speak, or a restriction" on the distribution of, or access to, speech, "the restriction is undoubtedly one on speech and cannot be countenanced . . . ." Id. (citations omitted). Under the FCC's "benchmark" process, and as was a disqualifying defect under

Riley, "the burden is placed on the [cable operator] . . . to rebut the presumption of unreasonableness." Id. at 793. Any presumption, of course, must militate for speech and communicative distribution free of governmental restriction or burdens. The FCC's benchmark process unlawfully inverts the constitutionally mandated priority.

The FCC's benchmark scheme closely parallels, but is far worse in a First Amendment context than, the scheme under review in Riley, because the North Carolina law was aimed at professional fundraisers while the FCC targets the press, thus compounding the constitutional infirmity. When government "claims the power to establish a single transcendent criterion by which it can bind the [cable operator's] speaking decisions" (e.g., benchmark rates), and justifies that benchmark determination by an "almost talismanic reliance on the mere assertion [that it] is simply an economic regulation with no First Amendment implication, its action "stands in sharp conflict with the First Amend-
ment's command that government regulation of speech must be mea-

If a tax selectively applied to the press is at odds with the First Amendment, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), then comprehensive rate regulations that narrowly target and facially restrain the distribution practices of one element of the press are, a fortiori, unconstitutional. A tax, at very least, starts out on the right foot, U.S. Const. Art. I, sec. 8, Cl. 1 ("The Congress shall have Power To lay and collect Taxes"), while a law targeting the press and deliberately restraining communicative activity runs smack into the First Amendment's command ("Congress shall make no law . . . abridging the freedom of speech, or of the press").

Were the Form in question to be thrust upon newspaper publishers, or indeed any other editors or purveyors of mass-media communications, as a condition precedent to conduct of their communicative functions, it would forthwith be declared a facially unconstitutional prior restraint on speech and press in violation of the First Amendment. See, e.g., City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-761 (1988). Cable operators, like "[n]ewspapers are engaged in the business of expression," and that fact constitutionally renders the regulation of their business materially different from those whose primary business is not "expression." Id. at 761. Thus, while a power or telephone utility, for example, may be rate-regulated, the press may not. Id. See also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120 (1973)(recognizing a "basic distinction" between regulation of the communications media and a "utility that itself derives no protection from the First Amendment"); 47 U.S.C. § 541(c) ("any cable system shall not be subject to regulation as a common carrier or utility"). Nonetheless, the Form under review imposes, or is the precursor to, the most vigorous, utility-like regulation on the cable press. What the FCC unquestionably has done, without any consideration of the obvious constitutional implications, is to apply, in toto, its expertise in the rate regulation of telephone carriers to the distribution of mass media communications via cable television lines. In the process, it injects itself into the management and welfare of cable operations, ignoring the protections afforded speech and press under the First Amendment.

The devastating impact of this form on small cable television operators, alone, is reason to reject the FCC's creation. When that impact is considered in the further context of the unconstitutional nature and intended usage of Form 393, the FCC's creation is beyond salvage.

Accordingly, FCC Form 393, the facial purpose and effect of which is to restrain freedoms guaranteed by the First Amendment, may not rationally be deemed "necessary for the proper performance of the functions of the [FCC]". 44 U.S.C. § 3508. On its face, the Form is part of an improper scheme. OMB, we trust, is more than a rubber stamp for the FCC, especially when (i) the form under review manifests presumptively unconstitutional defects, and (ii) the FCC intentionally stands mute on, or is oblivious to, the obvious, pressing constitutional question. OMB must therefore reject FCC Form 393.

Respectfully,

John P. Cole, Jr.

cc: William F. Caton, Acting Secretary (Via Hand Delivery)
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554